UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

GALAXY TOWERS CONDOMINIUM ASSOCIATION

Respondent

and

Case No. 22-CA-030064

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION

Charging Party

RESPONDENT GALAXY TOWERS CONDOMINIUM ASSOCIATION'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by:

Christopher J. Murphy, Esq. 117-119 North Olive Street Media, PA 19063 cjmlabor@gmail.com (484) 442-0060

Michael E. Lignowski, Esq. MORGAN, LEWIS & BOCKIUS LLP 1701 Market Street Philadelphia, PA 19103 mlignowski@morganlewis.com (215) 963-5455

Attorneys for Respondent
Galaxy Towers Condominium Association

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I. <u>INTRODUCTION</u>

As set forth in its Cross-Exceptions to the ALJ's Decision, Galaxy Towers Condominium Association ("GTCA") excepts to certain unfair labor practices ("ULP") erroneously found by Administrative Law Judge Steven Davis ("ALJ") concerning GTCA's obligations to bargain with Local 124, Recycling, Airport, Industrial & Service Employees Union (the "Union") and to comply with related information requests. First, the ALJ erroneously found that GTCA had continued obligations to provide information on subcontracting, despite the fact that the ALJ found the Union waived the right to bargain over such a decision. Alternatively, even if the Board should reverse the ALJ's assuredly correct finding on the MOA, the record evidence demonstrated the Union engaged only in sham and dilatory bargaining efforts that made the requests for information simply a part of the Union's overall scheme to improperly delay what was, in fact, a true impasse over the issue of subcontracting. In weighing this evidence, the ALJ erred in refusing to discuss the Union's decision to reject GTCA's offer to postpone its vote on subcontracting, as well as the Union's refusal to confirm with its members the number of employees who might be interested in a proposed severance package.

Additionally, the ALJ applied the incorrect legal standard in evaluating whether the parties had reached an impasse over a new contract. The correct authority is the standard applied to midterm bargaining, which establishes that "absent a wage reopener provision, the parties do not incur traditional bargaining obligations by meeting and discussing proposals for a midterm

¹ References to the ALJ's Decision are abbreviated herein as (ALJD at _ [page #], ll.__ [line number]), References to the record refer to the hearing of Board Case 22-CA-030064, unless otherwise designated, and are herein abbreviated as follows: Record citations to the transcript (Tr.), General Counsel exhibits (GC Ex.), and Respondent exhibits (R Ex.). Additionally, certain other errata appear in the decision, which are not excepted to solely on the basis that they did not affect the outcome of the ALJ's Decision. (*Compare* ALJD at 4, l. 52, incorrectly referencing Article 12, Section 4(e); with GC Ex. 12, referencing the same language at **Article 1**, Section 4(e)).

² Despite GTCA's agreement with the ALJ's Decision on this issue, GTCA further excepts to the absence of certain evidentiary rulings, should they be relevant the Board's analysis of the Counsel for the General Counsel ("GC")'s Exceptions.

modification." *St. Barnabas Med. Ctr.*, 341 NLRB 1325, 1325 (2004). Additionally, even if the Board should determine that the contract somehow omitted the management rights language on subcontracting, the parties bargained to impasse over the issue of subcontracting, and the ALJ erred in finding any movement sufficient to suggest the parties might resolve their opposition on this issue.

II. STATEMENT OF FACTS

A. The 2009-10 Negotiations For A Successor Collective Bargaining Agreement.

On or about June 5, 2006, a majority of GTCA's service, maintenance and garage attendant employees ("unit employees") selected the Union as their collective bargaining representative in an NLRB-supervised election. (GC Ex. 3; Tr. 33). As a result, the Union replaced the employees' prior collective bargaining representative, Local 734 L.I.U. of N.A., AFL-CIO ("Local 734"). (*Id.*). The Union and the GTCA met in 2006 to commence negotiations for a collective bargaining agreement ("CBA") to replace the CBA between GTCA and Local 734. (GC Ex. 2; Tr. 33). As discussed more fully in Respondent's Answering Brief to General Counsel's and Charging Party's Exceptions to the Decision of the Administrative Law Judge, GTCA and the Union entered into a Memorandum of Agreement ("MOA") in January 2007. This MOA incorporated by reference a management rights clause ("MRC"), expressly granting GTCA the right to "subcontract any work" in its sole discretion. The existence of this subcontracting language in the MOA – a CBA still in force today – has been a disputed issue since that time.

³ Herein, Respondent's "Answering Brief" and cited as "Answering Br."

The MOA was set to expire on May 31, 2009. (GC Ex. 11). In advance of that termination date, the bargaining parties met to negotiate a successor CBA. (*See* GC Ex. 21).⁴ When they could not reach an agreement before the MOA's expiration, they entered into an "Extension Agreement" that extended the MOA through June 30, 2009. (GC Ex. 20).⁵

In June 2009, the parties exchanged proposals. (See GC Ex. 22, 23). GTCA's proposal, dated June 14, 2009, explained the extraordinary economic challenges facing the organization. (GC Ex. 22). Based on these economic circumstances, GTCA proposed to extend the CBA and all current terms by one year. (*Id.*). The Union rejected GTCA's proposal and expressed its desire to bargain a "full three year agreement." (GC Ex. 23).

The parties continued to bargain throughout the Summer of 2009. (*See* GC Ex. 21 (describing meetings occurring 6/24/09, 7/23/09, 7/27/09 and 8/13/09)). However, the parties continued to be unable to agree on a new CBA, at least in part because they could not agree on the disputed subcontracting language. (GC Ex. 24 ("The terms of the agreement as to . . . subcontracting . . . to remain unchanged."), GC Ex. 21 at p. 4 ("no subcontracting")). At their August 13, 2009 meeting, the parties discussed the prospect of submitting the subcontracting dispute to arbitration. (GC Ex. 21, at 9; Tr. 67, 324-25).

On August 31, 2009, the parties signed an "Interim Agreement," pursuant to which they indefinitely suspended bargaining for a successor CBA until an arbitrator decided the following issues: "(1) Does the current Agreement between the parties permit sub-contracting by the GTCA, and, if so; (2) What is the nature and extent of such permitted sub-contracting?" (GC Ex. 25). The Interim Agreement – which also has never been terminated – extended the parties'

⁴ Kingman became GTCA's chief spokesman at negotiations commencing with the parties' May 18, 2009 session. (GC. Ex. 21).

⁵ This exhibit refers to a "Collective Bargaining Agreement" expiring in on May 31, 2009. The only CBA signed by the parties with an expiration date is the MOA.

current CBA "until a date thirty (30) days after the delivery of the written decision of the arbitrator to the parties. . . ." (*Id.*). Consistent with the Interim Agreement, the parties suspended negotiations and did not formally meet again until Fall 2010.⁶

In June 2010, Union officer James Bernardone ("Bernardone") wrote to GTCA asking for bargaining. (Tr. 1255).⁷ GTCA responded that the 2009 Interim Agreement relieved it of the obligation to bargain, but that GTCA would meet to discuss grievances. (*Id.*). This overture led to a series of clandestine, informal meetings in which the Union expressed its desire to quickly agree on a new CBA, so that new agreement could be asserted as a bar to a representation challenge expected from a raiding union, Teamsters Local 966. (Tr. 1256-67). On or about August 3, 2010, Kingman met in his office with Bernardone and Union "consultant," Louis DeAngelis ("DeAngelis"). (Tr. 1257). According to Kingman:

Mr. Bernardone said I [i.e. Bernardone] have the authority to enter into a contract. I don't have to submit it to the membership. I can sign it. And we discussed a two year contract, which this was in -- it was the beginning of August 2010. So it would have taken us through the end of May 2011. We discussed the terms of a two year contract, which would have included at that time I think the last final economic off of the Galaxy as to pay raises and so. And also included some new language concerning subcontracting.

(Tr. 1257-58).

Kingman told the Union representatives that GTCA would only accept a contract that included subcontracting. (Tr. 1258). Again according to Kingman:

At which point the point was raised -- and I'm not sure whether it was Mr. DeAngelis or Mr. Bernardone, but one of them asked me about bumping rights and that if we outsourced, for example, the maintenance department or if we outsourced janitors, would those

⁶ Notwithstanding the Interim Agreement, the dispute over subcontracting was not resolved by an arbitrator. Only one hearing day was held and that was effectively a "show trial" for the Union's benefit. (Tr. 1268-69). Although both parties could have taken legal action to compel arbitration, neither side has.

⁷ The Union sought to bargain even though it had agreed to the 2009 Interim Agreement because it was being raided by a competitor Teamster local union.

employees then be able to replace let's say concierges? We had a somewhat lengthy discussion about how bumping rights would work. And at their request we sat down and drew up some language which included bumping rights. This was what they asked for, and I sat there with them and I wrote it out on a legal sheet. We also wrote some language concerning -- or I wrote some language concerning subcontracting various departments, because at that point we had no idea.

(Tr. 1260).

Kingman, Bernardone and DeAngelis then worked through draft subcontracting language. (Tr. 1262). After they had agreed on draft language, Kingman had his secretary type the draft language. Kingman then presented that agreed-upon subcontracting language to Bernardone and DeAngelis. (*Id.*). That agreed upon language stated:

In the event the employer shall subcontract a department or division, the employees of such department or division shall have the right to exercise bumping rights over less senior employees in job categories in other departments or divisions where such employees possess the requisite skill set and qualifications.

The Employer (GTCA) shall have the right to cease its status as the employer of employees at the GTCA facilities and outsource, that is, retain a third party who shall become the employer at the facilities of the GTCA, provided that if a majority of the work force hired by the outsourcing company at the facilities of the GTCA shall be comprised of former GTCA employees, the outsourcing company, upon request of the union representing such employees, will recognize the union and negotiate the terms of a new collective bargaining agreement.

(R Ex. 16). At that same time, the parties reached an agreement on an overall CBA.

At about that time, Kingman communicated via e-mail with GTCA's prior labor counsel, Stephen Ploscowe ("Ploscowe"), to get his informal reaction on the new subcontracting language and to determine if that language would present any issues for a potential subcontractor, Planned Building Services and its affiliates ("Planned"), which was represented by Ploscowe. (Tr. 1263-64, 1053-56; R Ex. 43). Kingman's August 20, 2010 e-mail to Ploscowe stated:

The GTCA has finalized terms of a new contract with the union, which includes the subcontracting/outsourcing language I sent you. The contract would be for two years retroactive to June 1, 2009. However, there is a new wrinkle. Yesterday I received a copy of a filing by the teamsters with the NLRB seeking certification as a representative of the employees. Apparently there is an issue as to whether the contract extension now in place is sufficient legally to defeat such a request. Two questions for you: (1) Can the GTCA sign a new contract with Local 124 while the teamsters request is pending with the NLRB? The notice I received asks us as employer to supply certain information, such as any contracts. Is there any liability to the GTCA if a new contract with Local 124 is signed next week? Please let me know your opinion ASAP. Thanks.

(R Ex. 43).

Based on his agreement with the Union, Kingman drafted a new CBA (which he titled "Memorandum of Agreement") for the Union to sign; he transmitted it to them on August 23, 2010 for execution. (R Ex. 17). That MOA contained the following language addressing subcontracting:

MANAGEMENT RIGHTS: Article 13, Section 2a. of the Agreement is amended to add the following language: "In the event the Employer shall subcontract a Department or Division, the employees of such Department or Division shall have "bumping rights" over less senior employees in job categories in other Departments or Divisions where such employees shall possess the requisite skill set and qualifications for such job category. The Employer shall have the right to discontinue and terminate its status as the Employer at the GTCA, and shall have the right to "outsource", that is, retain a third party who shall thereafter become for all legal and lawful purposes the employer of all employees at the GTCA facilities".

(Id.).

Despite reaching an agreement at Kingman's office, the Union reneged on its agreement and refused to execute this MOA, apparently because it learned that the contract would not bar the upcoming representation election. (Tr. 1266-67). Notably, despite receiving an e-mail from

Kingman asking for the Union to sign an MOA that included subcontracting language, the Union simply failed to respond.

A few months later, the Union sought to resume bargaining even though pursuant to the 2009 Interim Agreement, it had agreed to suspend negotiations indefinitely. GTCA initially was uncertain about its obligation to bargain with the Union during the pendency of the representation election and subsequent election objections (which ultimately resulted in a rerun election). However, GTCA eventually agreed to resume bargaining. Perhaps unsurprisingly, the parties' negotiations in late 2010 were not fruitful, culminating in a bizarre meeting attended by Union attorney Roy Barnes. (Tr. 1272-76). Barnes was grossly uninformed about the parties' bargaining and he suggested that GTCA simply agree to a substantial wage increase and deal with non-economic issues later. (Tr. 1275-76). GTCA politely declined that offer. (Tr. 1276).

B. The 2011 Negotiations.

1. The March 16, 2011 Meeting And Subsequent Communications Regarding Subcontracting.

On March 16, 2011, the GTCA and Union bargaining committees met for the first time since December 2010. (Tr. 1276). At this meeting, GTCA, through Kingman, presented the Union with what it characterized as a "last, best, and final offer" ("LBFO") for a successor CBA. (Tr. 1278; GC Ex. 42). Kingman explained that this LBFO was based on the substantive terms of the CBA that the Union had reneged on in August 2010, except that it included a proposal to settle a then-pending lawsuit concerning the Union's health and welfare plan. (Tr. 1278-9, R Ex. 17). After the Union objected to this litigation provision, GTCA withdrew that demand and *never raised it again thereafter*. (Tr. 1279). Bernardone effectively ended the March 16

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⁸ Kingman explained at the Hearing that GTCA had included the health fund litigation provision because it had been raised by Barnes, counsel for the Union, at the December 2010 bargaining meeting and identified by the Union itself as an issue that they wanted to resolve as part of an overall settlement. (Tr. 1279). As Kingman further

meeting by launching into a profane tirade at GTCA. He took the LBFO, crumpled it up, threw it across the table, and stormed out of the room. (Tr. 92, 1166, 1208, 1280).⁹

Even though GTCA had not yet made a proposal regarding the subcontracting of bargaining unit work, (Tr. 1165-66, 1284), Bernardone sent a letter, dated March 17, 2011, to GTCA homeowners stating a vehement and blanket objection to any subcontracting of unit work. He emphasized that any attempt to subcontract would be unqualifiedly opposed through litigation. (Tr. 1282-83; R Ex. 31). The Union's preemptive threat reinforced its consistent and unequivocal refusal to even entertain the idea of subcontracting. (Tr. 133-34).

On April 12, 2011, Kingman sent an e-mail to the Union's legal counsel, in which he: (1) advised the Union for the first time that GTCA was considering a specific proposal to subcontract certain unit work including housekeeping, concierge, and security services, and would provide further details at the parties' next meeting; (2) proposed dates for further negotiations; (3) described an anticipated 60-day timetable for the negotiation and final decision-making process concerning subcontracting; and (4) invited the Union to discuss and respond to the subcontracting proposal. (Tr. 1284; R Ex. 45). The Union, however, never responded with any substantive counterproposal.

2. The May 9, 2011 Meeting And Subsequent Communications Regarding Subcontracting Issues And Information Requests.

Nearly two months passed before the parties met again on May 9, 2011. GTCA made a detailed presentation to the Union bargaining representatives regarding GTCA's subcontracting proposal and its compelling financial basis. (Tr. 717, 1167, 1286). GTCA controller Joseph

explained, after GTCA withdrew this specific proposal any subsequent references to settling "litigation" after March 16 referred solely to the Union's occasional threats to file a ULP charge and to litigate the subcontracting issues before the NLRB. (Tr. 1281-82).

⁹ Accordingly, the ALJ's finding that the Union merely failed to make a counteroffer improperly ignores Bernardone's behavior, signaling the Union was far from engaging in productive behavior. (ALJD at 9, 1. 48). Accordingly, the Board should find Respondent's Cross-Exception No. 1 to have merit.

Manzi made a PowerPoint presentation consisting of detailed data contained on five slides; the presentation lasted approximately 30-60 minutes. (Tr. 1287-88; R Ex. 46). The primary focus of the presentation was on the substantial cost savings that GTCA could realize through subcontracting; the savings were estimated at over \$1,000,000 on an annualized basis. (Tr. 1293; R Ex. 46, at 4). In this proposal, GTCA contemplated subcontracting all the bargaining unit work except that performed by the In Unit Services ("IUS") employees, who perform maintenance work. (GC Ex. 43; R Ex. 46). The Union asked questions about the presentation and Manzi scrolled back and forth repeatedly through the slides to respond to the Union's requests. (Tr. 1288-1290). Even though it knew this paramount issue would be addressed, the Union made no counter-proposal on subcontracting at this meeting. (Tr. 1172-73).

After the presentation, the Union also made several requests for information, which it memorialized in a May 11th letter from its counsel, Steven Kern, to Kingman. (Tr. 1292; GC Ex. 44). The Union, through Kern, requested, *inter alia*, the following items:

- 1. Please provide the Request For Proposal (or Requests, if more than one) said to have been sent out by Galaxy concerning outsourcing of bargaining unit work and supervisory/management work related to such bargaining unit work that may be outsourced along with it.
- 2. Please provide the bids or offers or proposals said to have been received from five entities for performance of such work on an outsourced basis.

(GC Ex. 44).

By e-mail dated May 19, 2011, Kingman replied to Kern's letter, enclosing materials in response to the Union's information requests and again requesting that the Union provide a

¹⁰ Contrary to the scattershot testimony of the Union's witnesses, the presentation lasted considerably longer than "five minutes," (Tr. 1289), was not "twenty or fifty pages long," (Tr. 1287), and did not contain any "pizza charts," "pie charts," or "cartoons." (Tr. 1287, R Ex. 46).

substantive response to GTCA's subcontracting proposal. (Tr. 1292-93; GC Ex. 45). Kingman provided a four page document containing all of the financial and operational data contained in the May 9 PowerPoint presentation. (Tr. 1298-99, 1293; GC Ex. 45).¹¹ The Union did not respond to Kingman's letter and never challenged the accuracy or scope of the materials sent by GTCA on May 19. (GC Ex. 45; Tr. 1300).

Taking into account the information provided orally at the May 9 meeting and as confirmed in the e-mail and attachment from Kingman on May 19, the Union had received all the responsive and available information it had requested. (Tr. 1295, 1301; GC Ex. 44). With respect to Request #1 – responsive information was provided in Kingman's e-mail and related attachment on May 19, which attachment contains all the information requested. (Tr. 1301). Moreover, the Union itself had direct access to the information regarding employee classifications by virtue of their representational status. (Tr. 1293-94, 1301). Regarding Request #2 – GTCA representatives had previously explained to the Union that it had received five bids in response to the RFP, but that two of those bids had been disqualified because they were from non-union contractors; therefore, those bids were completely irrelevant to the subcontracting discussion. (Tr. 757, 1301-1302). Moreover, at future meetings Kingman explained that the only bidder being considered as a potential contractor was Planned, that their bid and the actual terms being offered would be the subject of further negotiations, and that the original bid was obsolete and irrelevant. (Tr. 1301-1302). Finally, even to the extent that the bids could have been relevant, GTCA explained that the bids were subject to confidentiality agreements with the respective bidders, a position the Union did not contest. (Tr. 757). After

¹¹ As explained by Kingman at the Hearing, certain of the additional information contained in the attachment to his e-mail was comprised of the substantive portions of the underlying Request for Proposal ("RFP") issued by GTCA to potential bidders, including in particular pp. 9-14 of that RFP. (Tr. 1295; R Ex. 47).

receiving these materials, the Union stopped asking for bids or financial related information until several meetings later. (Tr. 738).

3. The May 23 meeting and subsequent communications.

On May 23, the parties held their next collective bargaining session. (Tr. 742, 1304). Despite the passage of two weeks since the previous meeting and the Union's receipt of the requested subcontracting information, the Union did not make a specific, substantive counterproposal with respect to GTCA's contemplated decision to subcontract unit work. (Tr. 1174, 1209-10, 1304-1305). Rather, the Union admitted (as they would repeatedly throughout the bargaining process) that they could not possibly match the savings which GTCA would realize through subcontracting. (Tr. 742, 744). Kingman again requested a substantive counterproposal and advised the Union that the GTCA Board of Directors intended to consider and vote in early June on whether to move forward with negotiations with Planned. (Tr. 1305). 12 Rather than make a proposal on the decision to subcontract, the Union initiated discussions about how the subcontracting and subsequent hiring process would take place with the new employer. (Tr. 1175). For example, the Union asked whether all employees could be interviewed and offered jobs by the new employer. (Tr. 742, 1175). Further, the Union and GTCA discussed confidentiality concerns regarding the transfer of personnel files to Planned. (Tr. 596). Kingman explained that GTCA could not dictate hiring decisions for the new employer, but he agreed to seek assurances that all current employees could interview if they so chose to. (Tr. 1175). The next bargaining session was set for June 7, 2011.

¹² As noted by Kingman at the Hearing, GTCA never gave the Union a hard deadline or an ultimatum; rather, at all times, GTCA was flexible on the timing of negotiations and implementation of the decision under consideration and provided the Union with regular and ongoing updates and multiple opportunities to delay the process, as necessary. (Tr. 731, 1171, 1305, 1319; R Ex. 43).

Prior to the next face-to-face meeting, DeAngelis called Kingman on June 6 and advised him that he was going to make a substantive proposal on behalf of the Union at the next meeting concerning the effects of GTCA's decision to subcontract the unit work at issue. (Tr. 1307-08; R Ex. 48). 13 DeAngelis also stated that negotiations over a new comprehensive CBA were now "academic" and irrelevant, given GTCA's subcontracting proposal. (Tr. 1307, 1312). During that call, DeAngelis outlined the structure of an effects bargaining proposal under which approximately one third of the current Galaxy employees would accept an unspecified amount of severance pay and not seek reemployment with Planned, one third would be hired by Planned at their current rate, and one third would be hired by Planned at an unspecified reduced rate. (Tr. 1309-1310; R Ex. 48). DeAngelis emphasized that one of the Union's main concerns was to preserve as many jobs as possible with the new employer. (Tr. 1310). Kingman and DeAngelis then talked about how they might involve Planned in related discussions, to the extent the Union was seeking specific hiring and wage-related objectives. (Tr. 1311). DeAngelis also indicated that he either would or might already have met with Planned to discuss these issues independently. (Tr. 1311).¹⁴

4. The June 7 meeting.

The day after Kingman and DeAngelis spoke on the telephone, GTCA and the Union met for a full bargaining session on June 7. (Tr. 746, 1314). Before the employee committee members arrived, DeAngelis stated that the Union understood GTCA would likely implement the decision to outsource and that, while the Union could file a ULP charge, they preferred to reach an agreement over the effects of the subcontracting decision and to preserve as many jobs

¹³ Kingman kept notes of this meeting, which were consistent with his testimony. (R Ex. 48). DeAngelis, of course, had no written record of this call.

¹⁴ GTCA subsequently learned that DeAngelis and Bernardone had met with Robert Francis of Planned. (Tr. 105-06, 402, 802).

as possible with Planned. (Tr. 764, 803-04, 1314). DeAngelis indicated that he also knew that a number of current employees wanted to leave the Galaxy anyway and so might be interested in a severance package. (Tr. 1314). During this exchange, the employee members of the committee arrived. They were very upset and vocal that the Union had engaged in effects bargaining over what would happen after outsourcing took place. (Tr. 1316). This outburst was quickly followed by a caucus. (Tr. 1316).

After the break, the Union raised for the first time in nearly a month the issue of information allegedly needed to "understand" GTCA's subcontracting proposal. (Tr. 1317). Specifically, the Union asked for breakdown of the number of the anticipated hours employees would be working at the new employer within the outsourced classifications. (Tr. 1317). Although the Union could have easily derived this data from information it already possessed, GTCA provided the requested information at the meeting. (Tr. 1317). The Union again made no specific proposal concerning subcontracting, while conceding that the only way the Union could match the savings at issue would be if the employees took a 30% pay cut. (Tr. 1318). Finally, on June 7, 2011, Kingman reminded the Union that the GTCA Board was intending to vote on whether to move forward in final negotiations with Planned. Kingman asked the Union if they would like him to have the GTCA Board delay the vote. (Tr. 1319). Significantly, the Union declined his offer and told him the Board should move forward. (Tr. 1319). On June 9, the Board voted to authorize Kingman to enter into negotiations with Planned concerning the terms of a potential subcontracting agreement. (Tr. 1322).

5. The June 16 meeting.

On June 16, 2011, Kingman and DeAngelis met alone at Kingman's office. (Tr. 1320-21). At this meeting, Kingman and DeAngelis continued the discussion they had had on June 6 and other occasions regarding effects bargaining, whereby some portion of the current employees would take a severance package and the remaining employees would accept employment with Planned under a two-tiered wage rate structure. (Tr. 1320-21). DeAngelis expressed his hope that Planned would hire all the current employees that did not accept severance. He also stated that he was particularly concerned about the jobs of the employees with high seniority, especially those working in the front desk/concierge classification. (Tr. 1320). DeAngelis said the Union would make a comprehensive effects bargaining proposal at the next full negotiating session, which would include a specific severance proposal linked to seniority. (Tr. 1321; GC Ex. 59). Throughout these discussions, DeAngelis never indicated that he or the Union intended that any of the employees subject to the subcontracting proposal would continue to be employed by GTCA. (Tr. 1322).

6. The June 20 meeting.

GTCA and the Union next met on June 20, 2011 at the Galaxy Towers. (Tr. 805, 1324). DeAngelis explained that the Union had two routes it could take – litigation or effects bargaining – and that it chose to engage in effects bargaining. (Tr. 1182, 1324). The Union then made a specific effects bargaining proposal which included offering a severance package to all employees under which employees would be eligible for one week of pay for each year of service. (Tr. 805, 1176-78, 1324). The Union stated that its proposal was based on the assumption that approximately one third of the employees would accept the severance offer and

¹⁵ Once again, Kingman had notes of this meeting. (See GC Ex. 59). DeAngelis, of course, had none.

¹⁶ Kingman had notes of this critical meeting; DeAngelis "lost" his. (Tr. 108-09, 175; see GC Ex. 59).

separate their employment permanently; one third would be offered jobs with Planned at their current contract rate and one third would be offered jobs with Planned at a rate \$3.00/hour lower than the contract rate. (Tr. 805, 1210-11, 1324, 1326).¹⁷ GTCA quickly analyzed the severance component of this proposal and determined that it would cost the organization over \$1.65 million in severance pay in 2011 if every employee took the buyout option, a preposterous proposal given the Union's knowledge that GTCA was desperate to cut costs immediately. (Tr. 810, 1212, 1325). While GTCA was willing to negotiate over this comprehensive proposal, Kingman also made it clear to the Union that in order for it to reasonably assess any severance proposal, GTCA would need to know how many employees the Union was prepared to require to take a severance package. (Tr. 818, 1214, 1330).¹⁸

At this June 20 meeting, the discussion solely concerned the circumstances under which the current employees would either take severance or leave and become employees of the "new employer." (Tr. 1178, 1180, 1210-1211). The parties *never* discussed a scenario whereby these employees would remain employed by GTCA. (Tr. 1326-27). Relatedly, the Union did not make any proposal describing *specific cost savings* to GTCA as an alternative to outsourcing. (Tr. 1326-27). Moreover, despite its awareness that the GTCA Board was

¹⁷ This public proposal was consistent with the proposals DeAngelis had discussed in his private discussions with Kingman on June 6, 2011 and June 16, 2011.

¹⁸ Absent a hard number of employees that would be severed, GTCA's severance cost was an unknown variable. If a very high number of employees took severance, then GTCA's cost of severance in 2011 would significantly eroded the savings it was trying to achieve.

¹⁹ At this meeting DeAngelis also emphasized that the Union was most concerned about protecting the jobs of the concierge (front desk) employees in connection with the new employer. (Tr. 1179, 1211).

²⁰ DeAngelis attempted to claim after the fact that the Union's proposal at this and other meetings only ever contemplated "voluntary" departures from Galaxy. (Tr. 110). As noted elsewhere, DeAngelis' notes for this important session conveniently disappeared. Moreover, this claim was directly at odds with the specific, consistent and credible testimony of GTCA representatives Michael Kingman, Ruth Olsen and Eugene Blum that the discussion on June 20 and other dates always and solely concerned an arrangement whereby all employees at issue would involuntarily separate employment from GTCA, with some accepting severance and the others seeking employment with the new employer. Further, the bargaining notes from Union counsel Kern also contradicted DeAngelis and reflected that the Union proposal on June 20 was structured in part to protect the jobs of employees

seriously contemplating the subcontracting of unit work, the Union neither asked any questions about the economics of that decision nor requested that GTCA delay the process in order to allow for further consideration by the Union. (Tr. 1177-78, 1327-28). In sum, as at previous meetings it was clear that the Union had acquiesced in the decision to subcontract and was focused solely on bargaining over the "effects" of that decision, including on the transitional process and on the terms for employees who either accepted severance or were hired by Planned. (Tr. 1181-82, 1330).

7. The June 30 meeting.

The parties met again on June 30. (Tr. 1331). Oddly, at this meeting the Union avoided entirely the subcontracting issue and only asked about the status of GTCA's March 16 LBFO – an issue it had not raised since that March meeting. (Tr. 1331). When Kingman asked the Union for a counter-proposal on subcontracting, the Union obliquely responded only that they hoped GTCA would "come to its senses." (Tr. 1331). Kingman believed that the Union never intended to make a substantive proposal on subcontracting. (Tr. 1332-33). Returning to the issue of the effects of the decision, Kingman offered a severance proposal in an amount equal to \$1,000 per employee, which would have capped total liability at under \$70,000 if all employees took it. (R Ex. 44, at 25).

In early July 2011, Kingman concluded negotiations with Planned for a subcontracting agreement. Planned then began the process of interviewing and making offers to employees prior to the anticipated start date of August 1, 2011. (Tr. 1058). Planned circulated an offer sheet and arranged a specific date to conduct interviews on site at the Galaxy Towers. (Tr. 393; GC Ex. 52). Shockingly, only a few employees showed up to interview; all

above a "certain seniority level." (GC Ex. 54, at 9). This proposal, of course, would be unnecessary if the arrangement was entirely "voluntary."

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interviewees were offered positions. The Union then failed to show up for the next scheduled bargaining session on July 22, 2011. (Tr. 1335).

8. The July 27 meeting.

The parties next met on July 27, 2011. (Tr. 1183-84, 1215, 1336). Bernardone opened the meeting by insisting that the parties had never engaged in effects bargaining. After Kingman corrected him by pointing out that he had not been present at certain previous meetings, Bernardone exploded and launched into an abusive tirade, causing all present to fear for the worst. (Tr. 1183-84, 1215, 1336). After Bernardone stormed out, DeAngelis proposed a new severance package that would have been capped at \$500,000 if all employees accepted it. Kingman countered with a proposal with a cap of \$120,000. (Tr. 1338-39). DeAngelis said he would call with a further response in a few days, but never did. (Tr. 1340).

III. ARGUMENT

A. GTCA Did Not Fail Or Refuse to Bargain With the Union In Violation of Section 8(a)(1) Or 8(a)(5). (Cross-Exception No. 9)

GTCA excepts to the ALJ's conclusion that Respondent failed to bargain with the Union over the terms of a new contract, unlawfully declared impasse, and/or unlawfully implemented the terms of its last best and final offer. (ALJD at 16, ll. 40-42).

1. The ALJ Decision Applies The Incorrect Legal Standard For Determining Whether GTCA Bargained Lawfully.

The ALJ erred in concluding GTCA unlawfully refused to bargain for a new contract to cover the IUS employees.²¹ Because the MOA remained in force during the entire period of the

(See ALJD at 15, ll. 50-52; 16, ll. 1-8).

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²¹ The IUS employees were the sole bargaining unit employees who remained following GTCA's lawful subcontracting decision. Although not explicitly stated, the ALJ's holding cannot logically apply to the approximately 67 employees working in positions subcontracted to Planned (the "subcontracted positions"). Because Respondent lawfully exercised its right to subcontract these positions pursuant to the Union's clear and unmistakable waiver as outlined in the Management Rights Clause agreed to in 2006, (ALJD at 20, ll. 1-25), it would be inconsistent to impose a further obligation to bargain over the terms of a new contract for these employees.

2011 bargaining and because neither party attempted to terminate that CBA, the parties' negotiations necessarily constituted voluntary midterm bargaining. The ALJ inexplicably failed to find this undisputed fact and to make the appropriate legal conclusions based on it.

Specifically, the parties signed an "Interim Agreement," on August 31, 2009, pursuant to which they agreed to indefinitely suspend bargaining for a successor CBA to permit binding arbitration in connection with the issue of subcontracting. (ALJD at 8, Il. 20-24). The Interim Agreement also extended the parties' current CBA "until a date thirty (30) days after the delivery of the written decision of the arbitrator to the parties. . . ." (GC Ex. 25). As the condition precedent for the termination of the MOA – the issuance of the arbitration decision – has not occurred, the CBA continues in force. ²²

It is well-established that "the proposal of a midterm modification does not impose a bargaining obligation[,] ... [and] absent a wage reopener provision, the parties do not incur traditional bargaining obligations by meeting and discussing proposals for a midterm modification." *St. Barnabas Med. Ctr.*, 341 NLRB at 1325. The Board has expressly held that neither the party receiving a midterm proposal, nor the party proposing such changes, has any obligation to discuss or agree to such a proposal, absent a reopener provision. *Connecticut Power Co.*, 271 NLRB 766, 766 (1984). Simply put, "Section 8(d) [of the NLRA] protects every party to a collective-bargaining agreement from involuntarily incurring any additional bargaining obligations for the duration of the agreement." *Id.* Accordingly, the ALJ applied the wrong legal standard in evaluating the conduct of the parties bargaining in 2011. (ALJD at 16, Il. 4-8, 21-22, 40-42).

²² The GC admits the Interim Agreement and the MOA both remain in effect. (*See* General Counsel's Brief in Support of Exceptions, filed Nov. 19, 2012, at 12).

Regarding the IUS employees, GTCA had no obligation to bargain with the Union for a new CBA for those employees, due to the continuing validity of the MOA. In fact, notwithstanding the ALJ's erroneous and factually unsupported order that GTCA rescind any unilateral changes to the IUS group's employment terms, (ALJD at 21, ll. 22-24, 42-51); GTCA has continued to abide by the terms of the MOA for those employees and has not made any unilateral changes.

2. The ALJ Incorrectly Found GTCA Refused To Bargain For A New Contract Involving the IUS Employees.

Even assuming, *arguendo*, that GTCA had an obligation to bargain for a new CBA for the IUS employees, it fully met this obligation. The ALJ's contrary conclusion is incorrect.

(ALJD 16, Il. 40-42). As shown by the record and ignored by the ALJ, GTCA proposed to bargain over the IUS employees. (Tr. 1198). GTCA, however, sought to defer those negotiations until it had determined the outcome of the overarching subcontracting issue. (Tr. 735, 1339). As Kingman explained, GTCA had a set amount of resources, and it first needed to determine whether those resources would be spent on any agreements with respect to the subcontracting effects (including severance) before it could consider the funds available to fund enhanced terms for the IUS employees. (Tr. 778-80; 785). In fact, DeAngelis admitted that GTCA was willing to discuss the IUS employees after the larger issue was addressed: "I remember him using an expression that we don't know what the economic pie is and -- and simply that they weren't prepared to negotiate a full contract for maintenance *at that time*". (Tr. 146 (emphasis added)).

As of July 27, 2011, GTCA declared it would no longer continue to try to settle the discrepancies on the subcontracting language and was moving forward with its decision to subcontract, unless the Union decided to agree to the March 2011 proposal. There is no evidence

cited in the ALJ's opinion, however, indicating that GTCA ever refused to bargain with the Union over the IUS employees once that decision had been made. Between August 1, 2011, the effective date of the subcontracting decision, and the 2012 hearing before the ALJ, the Union never sought to bargain about the IUS employees – a fact proved by the GC's failure to introduce any post-subcontracting evidence on this issue. The fact of the matter is that, with respect to the IUS employees, the Union made no effort to bargain on their behalf, and GTCA did not refuse to bargain. The ALJ's decision regarding a failure to bargain with respect to these employees, accordingly, should be dismissed.

3. The ALJ Erred In Finding There Were Any Unilaterally-Implemented Changes Affecting The IUS Employees.

As the party bearing the burden of proof, the GC offered no evidence of any unilateral changes to the terms and conditions affecting the IUS employees, nor did the ALJ make any specific factual findings on any such unilateral changes. (ALJD at 16, II. 40-41). *See generally Posadas De Puerto Rico Assoc.*, 247 NLRB 1421, 1422 (1980) ("It is fundamental that the General Counsel has the burden of proving all allegations in the complaint"). Accordingly, there is simply no evidence to support this determination, and GTCA's cross-exception on this point should be adopted.

B. Alternatively, Even If The Board Reverses the ALJ's Decision On The MOA, GTCA Fully Met Its Obligation To Bargain In Good Faith With The Non-IUS Employees. (Cross-Exception Nos. 7, 9).

Although both the facts and law establish the Board should adopt the ALJ's determination that GTCA lawfully subcontracted pursuant to its management rights clause, the Board should alternatively affirm the ALJ's Decision on the basis that GTCA fully met any obligation to bargain in good faith on the issue of subcontracting. The ALJ erred in failing to

reach this conclusion. (ALJD at 15, Il. 45-52; 16, Il. 1-8, 20-21, 40-42).²³ As discussed below, while the Union staunchly expressed its opposition to subcontracting, it simultaneously conceded behind closed doors that it could not hope to provide a valid counterproposal. Contrary to the ALJ's findings, the Union proceeded to focus solely in effects bargaining and never offered any ray of hope of concessions on the subcontracting decision. Moreover, the Union engaged in a course of surface bargaining, offering vague suggestions of a severance proposal that never materialized and requesting information solely to delay and frustrate the subcontracting decision. Thus, despite the Union's two-pronged approach, in which it both appeared to agree it could not match the subcontracting savings in private, while denying to the bargaining unit members that they had done so, one immutable fact remains: Once the Union learned of GTCA's proposed decision to subcontract, they never made, nor intended to make, any substantive counterproposal in response to GTCA's proposal. Rather, the Union made only vague promises of such offers, while simultaneously taking affirmative actions suggesting GTCA should move forward with its decision. As such, the Union acquiesced in the decision. Moreover, even if not found to have in fact, acquiesced, the Union's cumulative actions left the parties at a legal impasse.

1. The Union, Through Its Statements and Actions, Acquiesced To The Subcontracting Proposal. (Cross-Exception Nos. 3, 4).

The ALJ erred in holding the Union did not acquiesce in GTCA's decision to subcontract. (ALJD at 12, Il. 1-6, 14-17). GTCA made a discrete proposal to the Union on April 12, 2011 to subcontract the work performed by the non-IUS employees. GTCA then repeatedly attempted to engage the Union in bargaining over this proposal over the next three and a half months. (*See*, *e.g.*, Tr. 1284-85, 1304-05, 1318-19; R Ex. 45). The record shows that the Union

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²³ Even if, *arguendo*, the Board reverses the ALJ's Decision on the MOA, GTCA had to reach an impasse only on the discrete issue of its proposed decision to subcontract before implementation and was not obligated to bargain to an overall impasse on a full contract before moving forward with its decision.

obstinately refused to bargain over the substantive issue of subcontracting, stating repeatedly through its representatives that it simply could not and would not propose savings approaching those contemplated under GTCA's proposal. (*See* Tr. 742, 744, 818, 1172-74, 1214, 1284-85, 1304-05, 1318-19, 1326-27, 1331).²⁴ The Union took and maintained a fluctuating position on subcontracting, flatly rejecting the concept in public while simultaneously discussing how its employees would transition to Planned. Regardless of its "position of the day," the Union repeatedly acknowledged that it was impossible for it to match or approximate the savings that GTCA could realize through its subcontracting proposal. (*Id.*)

Consistent with this acknowledgment, the Union acquiesced in the decision to subcontract and focused on the effects of that decision and its expected relationship with the new employer, Planned. (Tr. 596, 742, 1175, 1320-22, 1324, 1326-27). The ALJ's finding to the contrary simply cannot withstand the weight of the record evidence. (ALJD at 11, ll. 50-51). Over the course of several meetings the parties discussed various aspects of the transition to a new employer and its effects on the employees, including primarily: (1) the interview process and hiring opportunities with Planned, (2) the disposition of employee personnel files, (3) severance payment opportunities for departing employees, and (4) wage rates and seniority rights for employees with the new employer. (Tr. 596, 742, 1175, 1320-22, 1310). Such facts clearly show that the Union recognized the inevitability of subcontracting and chose not to oppose it.

Moreover, the ALJ erred in failing to consider the import of the Union's rejection of GTCA's offer on June 7, 2011 to postpone the Board's vote on whether to move forward with final negotiations with Planned. It is undisputed that during the parties' June 7, 2011 bargaining session, Kingman reminded the Union that the GTCA Board was intending to vote on June 9 on

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²⁴ Although the ALJ found that Kingman conceded the Union never used the exact language, in 2011, that it was waiving its right to bargain, the Union's entire course of action supported a conclusion it had acquiesced in the decision. (ALJD at 12, ll. 14-17).

whether to move forward in final negotiations with Planned. Kingman asked the Union if they would like him to have the GTCA Board delay the vote. (Tr. 1319). The ALJ erred in failing to consider this evidence of acquiescence and by failing to hold such agreement, in fact, privileged GTCA to implement its proposal.

2. Even If The Union's Conduct Did Not Constitute Acquiescence, The Record Facts Clearly Show That The Parties Were At Legal Impasse Over The Issue Of Subcontracting.

Further, the ALJ incorrectly interpreted the standard outlined in *Hayward Dodge*, 292 NLRB 434 (1989) and failed to evaluate the factors listed in *Taft Broadcasting Co.*, 163 NLRB 475 (1967) (ALJD at 15, ll. 45-52; 16, ll. 1-8, 20-21). An impasse occurs when an employer and a union have engaged in good faith negotiations over a particular matter which is subject to collective bargaining and, despite their best efforts to reach agreement, neither party is willing to move from its respective position. See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 n.5 (1988) (impasse is the "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless"). The Board also has defined impasse as "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile." A.M.F. Bowling Co., 314 NLRB 969, 978 (1994), enf. denied on other grounds, 63 F.3d 1293 (4th Cir. 1995); see also NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952) (duty to bargain in good faith does not require parties "to engage in fruitless marathon discussions"). Further, the Board will not permit a union to prevent an employer from engaging in legitimate business decisions by an outright refusal to consider the employer's proposals and by failing to make substantive counterproposals. In this regard, an employer is not required to engage in never-ending "negotiations" with a union after it is apparent the parties are at impasse over the subject at issue. See Cmty.

Gen. Hosp., 303 NLRB 383, 385 (1991) (holding that while bargaining must be conducted in good faith, it need not continue in perpetuity).

The *Hayawrd* decision, cited by the ALJ, provides that to avoid impasse, there must be movement sufficient to create "a real potentiality for agreement if explored in good faith in bargaining sessions." *Hayward Dodge*, 292 NLRB at 468 (holding no such potential for agreement existed). The decision, however, further clarifies this standard by explaining the concessions must not be "trivial or meaningless" but instead must be "reasonably calculated to give the parties hope [of] continuation of the negotiations[.]" *Id.* This analysis must be viewed in the context of the overall negotiations. *Id.*; *see also Taft Broad. Co.*, 163 NLRB 475 (1967).

The ALJ incorrectly applied this standard in concluding there was no impasse over subcontracting. (ALJD at 16, 1. 4). (*See* Tr. 1310). As noted above, GTCA repeatedly sought to elicit a specific, substantive proposal from the Union in response to its own financially motivated proposal to subcontract the vast majority of bargaining unit work. Despite these repeated efforts, the Union refused to make any substantive counter-proposal in the course of bargaining. While the Union's haphazard and mercurial bargaining makes it difficult to discern what exactly the Union hoped to accomplish (other than to embroil GTCA in protracted litigation in multiple forums), the evidence establishes that the Union publicly maintained an explicit and categorical opposition to subcontracting in any form and under any circumstances. Notably, Bernardone published the Union's intransigent position even before GTCA had made an actual proposal on the subject. (Tr. 1282-83). In fact, in his letter dated March 17, Bernardone asserted that the Union would never agree to subcontracting and that any attempt to do so would result in litigation. (R Ex. 31). As summarized by Kingman at the Hearing, thereafter the Union's only concrete response to the subcontracting proposal was "don't do it." (Tr. 1304).

Moreover, the ALJ erred and mischaracterized Kingman's testimony on the Union's proposals. (*See* ALJD at 11, ll. 16-18 and GTCA's Cross-Exception No. 2). Kingman testified:

They never proposed anything that would save us money long term. All of their proposals actually increased costs, except for when Mr. DeAngelis tried to put together a package that included the subcontracting.

(Tr. 1305). The ALJ erred when he characterized this language as a "concession" that the Union offered any legitimate counter proposals. *See Hayward Dodge*, 292 NLRB at 468 (noting "it is significant that a substantial number of the Union's bargaining proposals called for Respondent to increase employees' current economic benefits and, except for the Union's incentive bonus proposal, not one of the Union's proposals accepted the idea of a decrease in any of the employees' current economic benefit").

a. Any hypothetical savings offered pursuant to a severance package was insufficient to avoid impasse. (Cross-Exception Nos. 3, 7).

The June 30, 2011 bargaining session—on which the ALJ relies in holding no impasse existed—epitomizes the Union's wholesale failure to bargain over the subcontracting issue. As the ALJ noted, the Union alleged that it could offer cost savings through a severance package involving the voluntary separation of bargaining unit employees. (ALJD at 16, Il. 1-8). The ALJ erred, however, in finding the Union presented any semblance of a fixed estimate. (*Id.* at 11, Il. 47-51; 16, Il. 4-6). The Union, instead, never committed to a specific number of employees it would require to, or who would voluntarily accept such a package, making any proposed savings wholly illusory. (Tr. 818, 1214, 1330, 1339-40). Given the parties' extensive discussion on this issue without any concrete proposal from the Union it is clear that a bargaining impasse had been reached. *Taft Broadcasting Co.*, 163 NLRB at 478; *see also Hayward Dodge, Inc.*, 292 NLRB at 468 (holding parties can avoid impasse by making concessions that are not "trivial or

meaningless, for a concession by either party on a significant issue in dispute precludes a finding of impasse...") (internal citations and quotation marks omitted); see generally Laurel Bay Health & Rehab. Ctr. v. NLRB, 666 F.3d 1365, 1375 (D.C. Cir. 2012) ("bare assertions of flexibility on open issues and its generalized promises of new proposals do not clearly establish any change, much less a substantial change in that party's negotiation position") (internal citations and quotation marks omitted). The Union here simply made no concession and offered only hollow proposals.

Accordingly, the ALJ erred in finding that the Union was "exploring ways in which different types of severance packages ...would cause Respondent to abandon its interest in subcontracting," because the Union's proposals were nothing more that feints, unsupported by specifics. Simply put, the wholesale failure of the Union to make any concrete proposal or estimate rendered an agreement on subcontracting impossible and left the parties at an intractable impasse. *See Michigan Transp. Co*, 273 NLRB 1418, 1420 (1985) (dismissing Section 8(a)(5) allegations where employer outsourced unit work after impossibility of reaching concessionary deal because union had no counterproposal).²⁵

3. The Union Engaged in Sham Bargaining Designed Only to Improperly Delay the Subcontracting Decision.

Alternatively, the ALJ erred in finding the Union had a continued interest in negotiations. (ALJD at 16, l. 4). The Union's actions taken after Bernardone's March 17th letter must be viewed in light of his stated opposition to subcontracting and demonstrate that the Union was, at the end of the day, unwilling to bargain in good faith at any level. Ultimately, all the meetings, phone calls, conversations, and information requests thereafter were simply part of a sham designed to delay and short-circuit the bargaining process and then attempt to set up specious

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²⁵ GTCA's witnesses uniformly testified that if the Union had made any reasonable proposal, it would have been given serious consideration by the GTCA Board. (Tr. 1185, 1217-18, 1322).

allegations of unfair labor practices. When it came time for any productive or cooperative action, such as accepting GTCA's request to delay its board vote, the Union failed to proceed. (Tr. 1319). In other words, the Union engaged in surface bargaining. (See Cross-Exception No. $8)^{26}$

Ultimately, the credible facts of record show that the Union simply never engaged, nor intended to engage, in meaningful bargaining over the issue of subcontracting, despite more than ample time and opportunity to do so. As such, GTCA was left with no alternatives and the parties were at impasse.

4. The ALJ Erred In Holding GTCA Insisted On A Permissive Subject of Bargaining. (Cross-Exception No. 5).

The ALJ erred in finding impasse could not be reached because GTCA insisted that the Union withdraw the ERISA lawsuit as a condition of a new contract. (ALJD at 12, ll. 28-29; 16, 11. 33-38). After the Union objected to this suggestion, GTCA withdrew the demand and never again raised this as a condition of an agreement. (Tr. 1279-80). As a matter of Board precedent, a single proposal promptly withdrawn cannot support a finding that a party "insisted" on a particular clause or term. See Puerto Rico Junior Coll., 265 NLRB 72, 78 (1982) (rejecting argument "that an employer commits a technical per se violation of the Act the minute it makes [an improper] proposal, even where it is promptly withdrawn without insistence after hearing convincing arguments from across the table"). Accordingly, the ALJ's finding that GTCA could

²⁶ Indeed, the NLRB's Division of Advice found that the Union has historically lacked a good-faith rationale in its bargaining with GTCA. (Tr. 312; R Ex. 5). As explained in a memorandum from the Division of Advice, "The Union has presented no rationale for withdrawing from the tentative agreements at issue here other than that 'no self-respecting union would agree' to them. Indeed, the Union has not even acknowledged that it withdrew from the subcontracting agreement, but rather has maintained that it never agreed to that provision notwithstanding compelling evidence to the contrary." (Id.). Although the conclusions drawn by the Division of Advice are not res judicata on this issue, the ALJ erred in failing to discuss the admissions of Union attorney Wendy Shepherd contained therein. See Douglas Aircraft Co., 307 NLRB 536, 543 n. 5 (1992) (identifying statement made to Regional Director as an admission under Fed. R. Evid. 801(d)(2)(A)). Not only do such statements further support the ALJ's conclusion that the Union agreed to the subcontracting clause in the management rights language, but this admission further demonstrates the Union's improper and sham bargaining posture throughout the parties' negotiations. (Cross-Exception No. 13).

not reach impasse on July 27, 2011 because of a demand made in March 2011 is in error. (ALJD at 12, II. 28-29; 16, II. 33-38). Instead, GTCA withdrew this specific proposal and thereafter referred solely to the Union's occasional threats to file a ULP charge and to litigate the subcontracting issues before the NLRB. (Tr. 1281-82).

C. GTCA Did Not Violate Sections 8(a)(1) Or 8(a)(5) Because The Union Waived Their Right To Information Through The Management Rights Clause. (Cross-Exception No. 6, 8)

As correctly found by the ALJ, GTCA lawfully exercised its contractual right to subcontract work to a third-party company. (ALJD at 20, ll. 1-25). Accordingly, the Union waived its right to bargain over this otherwise mandatory subject of bargaining. The ALJ mistakenly, however, held GTCA remained obliged to provide information with respect to this waived subject. (*Id.* at 14, ll. 17-36, 43-48; 15, ll. 18-37). GTCA respectfully submits that a party cannot have an information obligation that is collateral to, and arises out of, a bargaining obligation that has been waived. Instead, this request for information should be treated similarly to a request for information over a permissive subject of bargaining. See SEIU Local 535 (North Bay Ctr.), 287 NLRB 1223, 1223 (1998) ("To violate the Act, a refusal to supply information must . . . pertain to a bargaining subject categorized as a mandatory one"); see also Pieper Elec., Inc., 339 NLRB 1232, 1235 (2003) ("There is no duty to furnish information concerning a nonmandatory subject of bargaining"). Because Respondent lawfully exercised its right to subcontract pursuant to the Union's clear and unmistakable subcontracting waiver specified in the MRC and incorporated into the MOA, it would be inconsistent to impose a further obligation arising out of the waived bargaining obligation. Accordingly, the ALJ erred in reaching this inconsistent result. (ALJD at 14, ll. 17-36, 44-48; 15 at ll. 18-37).²⁷

²⁷ Similarly, due to the validity of the MOA, the refusal to provide this information cannot bar any potential impasse finding as it relates to IUS employees. (*Id.* at 16, ll. 24-38).

- D. <u>Alternatively, Even If the Board Reverses The ALJ's Decision On The MOA,</u> GTCA Provided All Required Information. (Cross-Exception Nos. 6, 8)
 - 1. The Union's information requests were invalid because they were presented solely in connection with a scheme to delay and frustrate the bargaining process.

Even if the Board reverses the decision finding the Union waived its right to bargain over the subcontracting decision, GTCA alternatively excepts to the ALJ's finding on the request for information on the basis that the requests were invalid and presumptively irrelevant because the Union never intended to bargain over subcontracting. Instead, the Union made these requests as part of a deliberate scheme to frustrate, delay, and impede the bargaining process. As described at length above, the record evidence demonstrates that the Union was publically and immovably opposed to any form of subcontracting, while privately acknowledging to GTCA that it could not offer a competitive subcontracting proposal and that effects should be discussed. (Tr. 744). Information need not be provided if the union's motivation is not to use the information to engage in good faith bargaining, but rather to delay implementation of an employer's decision. ACF Indus., LLC, 347 NLRB 1040, 1043 (2006) ("We agree with the judge that the Union's information request was purely tactical and was submitted solely for purposes of delay."); see NLRB v. Wachter Constr., Inc., 23 F.3d 1378 (8th Cir. 1994) (stating that information demands made in "bad faith" by the union need not be fulfilled). As the record shows, the Union's intractable position on subcontracting was apparent as early as Spring 2007. (See Tr. 50, noting DeAngelis claimed to have "hit the ceiling" when he realized the contract included the management rights clause because he felt, "[s]ubcontracting negates the whole contract"; GC Ex. 14). Accordingly, as the subcontracting decision drew closer, the Union simply used the information requests to attempt to obstruct the process, rather than to reach any agreement.

As a specific example, the Union continued to insist on reviewing the bids from nonunion companies, despite GTCA's repeated explanation that it had disqualified those two bids. (Tr. 1301-1302). As such, those items had no possible relevance to the Union's ability to bargain with GTCA. See Glazers Wholesale Drug Co., 211 NLRB 1063, 1066 (1974), enfd. 523 F.2d 1053 (5th Cir. 1975) (stating that information that has become "moot" need not be provided to a union representative).²⁸ The Union's continued insistence on this material, on which GTCA did not rely, further demonstrates the Union's decision to proceed in bad faith. Accordingly, the ALJ's finding that GTCA failed to provide any required information should be reversed on the basis that it was requested solely for purposes of delay. (ALJD at 15, ll. 20-37).

2. Additionally, GTCA Provided All Required Information.

The ALJ erred in finding there was no evidence of any confidentiality agreement. (ALJD at 15, 1. 18). At the hearing, Kingman testified,

- O: Okay. Now that's the way the bids were structured. But you didn't offer the Union to provide them with the bids in order to substantiate your claim that that was what was in the bids. Is that fair to say?
- I didn't offer to give them the bids? A:
- O: Correct.

A: That's correct. In fact, I told them that there were confidentiality agreements that precluded me from doing it. I did tell that to them.

(Tr. 750). Additionally, the ALJ failed to consider the fact that this explanation was not challenged, nor did the Union renew its request for any information for nearly a month, (See Tr.

²⁸ There was no finding, for example, that GTCA failed to timely advise the Union of its objections to providing the requested information.

1317; GC Ex. 44), distinguishing it from the cases cited in the ALJ's opinion. (ALJD, at 14, ll. 17-36).²⁹

Moreover, unlike the proposal at issue in National Grid USA Service Co., 348 NLRB 1235 (2006), all the substantive information in the RFP relating to the scope of services at issue concerned employees represented by the Union itself and, therefore, was information already directly within the knowledge and possession of the Union. This case is further distinguishable from E.I. Du Pont De Nemours & Co., 346 NLRB 553 (2006), because the dispute must be viewed within the particular bargaining history of the parties. Accordingly, unlike other decisions, there was simply no possibility that "had Respondent provided [all requested] information,...the parties could have achieved some movement on the proposal [] at issue." E.I. Du Pont De Nemours & Co., 346 NLRB at 558. Additionally, to the extent these decisions could apply to the instant matter, GTCA submits they should be overturned as applied, because they elevate form over substance, particularly where there are no allegations (even following production of the RFP at the hearing) that GTCA provided any misleading information. (Tr. 1300). Had the Union received the information in the particular form requested, it still would not have offered any additional proposals. For these reasons, the ALJ's findings contrary to this conclusion should not be adopted. (ALJD at 14, ll. 17-36, 43-48; 15, ll. 18-37).

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²⁹ GTCA further met its burden to demonstrate the bids were not relevant. In May 2011 GTCA advised the Union that it was only considering entering into an agreement with one of the five vendors that had submitted a bid, further rendering irrelevant the other four bids. (Tr. 1301-1302). Finally, as to that targeted vendor, Planned Building Services, GTCA advised the Union that the original bid was obsolete as the terms were subject to further negotiation; the Union never thereafter made a request for any information relating to a contract with Planned. (Tr. 757). For all these reasons, the vendor bids were no longer relevant at the time they were requested or shortly thereafter and therefore there was no obligation to produce them to the Union. *See Glazers Wholesale Drug Co., Inc.*, 211 NLRB at 1066.

E. The ALJ Erred in Failing To Rule on GTCA's Request for An Adverse Inference. (Cross-Exception No. 12).

In GTCA's Post-Hearing Brief, Respondent requested the ALJ draw an adverse inference against the GC or the Union for the failure to call its attorneys, Christopher Sabatella and Stephen Goldblatt, at the Hearing. (See GTCA's Post-Hearing Br. at 29). In support, GTCA provided authority demonstrating that the failure to call a presumptively favorable key witnesses should be reviewed with an inference that such witnesses would not have supported the Union and GC's position. *See Int'l Automated Machines*, 285 NLRB 1122 (1987), *enfd*. 861 F.2d 720 (6th Cir. 1988). The ALJ erred in failing to make a ruling, or provide any specific findings, on this request. *PPG Indus.*, *Inc.*, 338 NLRB 559, 559 (2002) (remanding case where ALJ did not rule on request for an adverse inference). The adverse inference is all the more appropriate here, since the GC, through his Post-Hearing Brief and Brief in Support of Exceptions, repeatedly tries to characterize writings made by those attorneys in a manner inconsistent with the plain meaning of the documents at issue.

³⁰ Although Respondent acknowledges this determination was not required to reach the result in the ALJ's Decision, GTCA must challenge this failure in light of the Counsel for the General Counsel's insistence that Goldblatt did not agree to the subcontracting proposal. (*See* General Counsel's Brief in Support of Exceptions, filed Nov. 19, 2012, at 23).

IV. <u>CONCLUSION</u>

For the foregoing reasons, the Company respectfully urges the Board to find merit to its Cross-Exceptions to the Administrative Law Judge's decision, and to dismiss the Complaint in its entirety.

Dated: December 3, 2012 Respectfully submitted,

/s/ Michael E. Lignowski

Michael E. Lignowski, Esq.

MORGAN, LEWIS & BOCKIUS LLP

1701 Market Street Philadelphia, PA 19103 mlignowski@morganlewis.com (215) 963-5455

Christopher J. Murphy, Esq. 117-119 North Olive Street Media, PA 19063 cjmlabor@gmail.com 484.442.0060 (office)

Attorneys for Respondent
Galaxy Towers Condominium Association